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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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NO. _____

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LARRY GILBERT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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PETITION FOR WRIT OF CERTIORARI TO

COURT OF COMMON PLEAS OF LEXINGTON COUNTY

SOUTH CAROLINA

---

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## QUESTIONS PRESENTED

I. Whether the court below correctly found that petitioner was not denied effective assistance of counsel where the uncontroverted evidence on the record established inter alia: 1) that trial counsel failed to conduct any independent investigation to secure evidence or witnesses in migitation; 2) failed to secure a psychological evaluation of petitioner; 3) failed to investigate the effects of drugs on petitioner at the time of the crime; 4) failed to present or argue evidence of petitioner's lesser participation in the murder, and where the resentencing trial judge characterized trial counsel's performance as "deficient," "poor," and "cavalier."

II. Whether the court below erred in finding that trial counsel's joint representation of petitioner and codefendant at the 1980 re-sentencing trial did not result in a conflict of interest and a denial of petitioner's right to effective assistance of counsel, where no inquiry was conducted by the trial judge into adequacy of representation or the potential for conflict of interest despite the trial judge's own belief that petitioner was not being adequately or properly represented.

III. Whether the court below erred in finding that no waiver by petitioner of his right to effective, conflict free assistance of counsel at his 1980 re-sentencing trial was required where the testimony of re-sentencing trial judge revealed that the trial judge's failure to conduct such an inquiry resulted entirely from his erroneous belief that the trial court was prohibited from acting to protect criminal defendants' Sixth Amendment rights to effective assistance of counsel where counsel had been retained rather than appointed.

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LARRY GILBERT,

PETITIONER,

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STATE OF SOUTH CAROLINA,

RESPONDENT.

## INTRODUCTION

The petitioner, Larry Gilbert, respectfully prays that a writ of certiorari issue to review the November 23, 1982, judgment of the Court of Common Pleas for Lexington County, South Carolina, on grounds that important questions of federal constitutional law are present on which there are conflicting decisions by the highest courts of other states and United States Courts of Appeals, and that the decision is in conflict with prior decisions of this Court. Additionally, this case presents a similar issue to United States v. Cronic, No. 82-660, cert. granted, ____U.S. ____, 51 LW 3598 (2/22/83), and Strickland v. Washington, No. 82-1554, cert. granted, ____U.S.____, 51 LW 3871 (6/4/83).

## OPINION BELOW

The order of the Court of Common Pleas for Lexington County, South Carolina is unreported and appears as Appendix A. The order of the South Carolina Supreme Court denying the petition for writ of certiorari is unreported and appears as Appendix B. The order of the South Carolina Supreme Court

denying the petition for rehearing is unreported and appears as Appendix C.

## JURISDICTION

The judgment of the Court of Common Pleas was rendered on November 23, 1982. The petitioner filed a timely notice of appeal and a petition for writ of certiorari with the South Carolina Supreme Court. The petition was denied on April 6, 1983. The petitioner filed a timely petition for rehearing which was denied on April 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right. . . to have the assistance of counsel for his defense."

United States Constitution Amendment XIV:

> "nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

## STATEMENT OF THE CASE

In 1977 the petitioner, and his codefendant, J. D. Gleaton, were indicted for and convicted of murder and armed robbery as a result of the July 12, 1977, death of Ralph Stoudemire, a South Congaree, South Carolina, service station operator. Petitioner's death sentence was reversed by the South Carolina Supreme Court because of improper jury argument by the solicitors (State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890 (1979)), and the case was remanded for a new sentencing trial.

On February 19, 1980, a resentencing trial was commenced and on February 26, 1980, the death penalty was again imposed on petitioner. The sentence of death was upheld by the South Carolina Supreme Court in State v. Gilbert, 277 S. C. 53, 283 S.E.2d 179 (1981).

At all stages of the proceedings through September 14, 1981, both petitioner and his codefendant were represented by the same attorney, Robert W. Mance.

On June 4, 1982, petitioner filed an application for post-conviction relief in the Court of Common Pleas for Lexington County, South Carolina, pursuant to South Carolina Code Section 17-27-10 et seq. In his application petitioner raised thirty-five grounds including the denial of effective assistance of counsel resulting from the failure to conduct an adequate, independent investigation, the denial of effective assistance of counsel because a conflict of interests arising from the joint representation, and the trial judge's failure to make the requisite inquiry into the potential for conflict arising from the joint representation. Petitioner's application was joined with that of his codefendant for hearing. A hearing was held during the week of September 20, 1982, and the court entered an order on November 23, 1982, denying the application.

The pertinent facts surrounding the incident and petitioner's trials are summarized below.

On Sunday, July 10, 1977, around midday the petitioner and his half-brother J. D. Gleaton left Salley, South Carolina, and drove to Columbia. Beginning that afternoon they embarked on a routine of drug consumption which continued through the morning of Tuesday, July 12, 1977. The linchpin of this routine was the intravenous injection of "Bams" (Preludin, or phenmetrazine hydrochloride NF) every four to six hours. In addition they were ingesting valiums, marijuana, and gin. During this period petitioner neither slept nor ate any food. This pattern continued until 11:00 AM on Tuesday, July 12, 1977, when they "shot up" for the final

time. (PCR. 414-423).[1]

At approximately 1:00 PM on Tuesday, July 12, 1977, two Black males driving a blue Mark IV Continental with a white top stopped at Ralph Stoudemire's SOC Station in South Congaree, South Carolina. The codefendant entered the station and asked for cigarettes. He then informed Mr. Stoudemire that it was a robbery. The petitioner remained outside. A struggle occurred between the codefendant and Mr. Stoudemire during which Mr. Stoudemire received five stab wounds to the trunk of his body, one a fatal wound to the heart. The petitioner entered the station and fired one shot from a .22 calibre pistol, inflicting a superficial wound on Mr. Stoudemire (PCR. 75; 843). The two men then left the scene in the car.

The next day, July 13, 1977, a highway patrolman in Aiken County, acting on information concerning the car involved in the incident, stopped a car occupied by petitioner, his codefendant, Bobby Carmichael, and Wilbert Gleaton. The four subsequently accompanied deputies to the Aiken Sheriff's Department. Later in the day investigators from the Lexington County Sheriff's Department arrived and arrested them on charges of murder and armed robbery. They were then transported to the Lexington County Sheriff's Department where they were booked and advised of their rights. During the course of that evening petitioner was questioned on more than one occasion, but did not make a statement.

On July 14, 1977, petitioner and codefendant were taken to the Richland County Sheriff's Department and given polygraph examinations. At approximately 5:00 PM that day petitioner was questioned by Charles Jones and James Harris, black investigators with the Lexington Sheriff's Department. Prior to that time

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[1]For purposes of uniformity and simplicity PCR will be used to designate the transcript of the post-conviction relief hearing, TR-I the transcript of record on appeal from the 1977 trial, and TR-II the transcript of record on appeal from the 1980 resentencing.

petitioner had talked to only white investigators. Shortly after talking with Jones and Harris, petitioner gave an oral confession which was later reduced to writing. Petitioner then accompanied deputies on a search for the weapons involved in the incident. Upon being informed that petitioner had confessed, codefendant also signed a confession.

Robert W. Mance became involved in the case on July 15, 1977, when members of petitioner's family were referred to him by a bail bondsman. (PCR. 261, 295). Mance was retained by petitioner's mother and initially undertook representation of petitioner, codefendant, Carmichael, and Wilbert Gleaton. (PCR. 296-297, 773).

Mance accompanied the family to the Lexington Sheriff's Department on July 15, 1977, and met with petitioner and codefendant for approximately thirty minutes. (PCR. 426-427) During this meeting he obtained copies and discussed the statements with them. (PCR. 427, 767). He also indicated he would look into getting them released on bond. (PCR. 427, 767). Between July 15, 1977, and the trial in October of that year trial counsel met with petitioner and codefendant four more times. All of these were joint meetings with petitioner and codefendant together. The first of these meetings was for the purpose of discussing the bond hearing and lasted twenty to thirty minutes (PCR. 427). Shortly before the preliminary hearing they met again for about half an hour. (PCR. 428). The third, also for approximately thirty minutes, was to inform them about the hearing to be held in Edgefield County on the motion for a change of venue (PCR. 429). The final meeting took place on the evening before the trial started. At this meeting which lasted an hour and a half, counsel had them write out what had happened from the time of their arrests to their confessions. During this meeting counsel talked with each of

them alone for a few minutes about calling them as witnesses, but did not review their testimony or the questions they would be asked. (PCR. 430-431). Trial counsel had no individual meetings with petitioner prior to trial.

During the course of the trial counsel met with petitioner three more times to discuss the case. Two of these meetings, approximately five minutes each, were right before petitioner took the witness stand to testify. (PCR. 432). The third was between the guilt and sentencing phases when Judge Peeples directed counsel to confer with his clients. (TR-I 876). Codefendant was also present for all of these meetings. Trial counsel did not meet with petitioner at night during the trial.

Prior to the October, 1977, trial counsel attempted to talk with only two of the State's witnesses, Deputies Jones and Byars. (PCR. 53, 56-57, 60, 75-76, 160-161, 212-213, 217, 471, 797, 833). Counsel asked Jones about a promise to petitioner that Jones would help him get bond if he made a statement. This was denied by Jones. Byars refused to talk with counsel. (PCR. 769-770).

On September 27, 1977, a motion for discovery and inspection and production of evidence by trial counsel was argued before Judge Peeples in Edgefield, South Carolina. (TR-I-7). The week preceding that hearing counsel received from the Solicitor some notes on the inquest and a list of witnesses. (TR-I-43). He also had copies of statements by petitioner, codefendant, Carmichael, and Wilbert Gleaton, and the incident report. (PCR. 816). He did not receive any written witness statements from the Solicitor (PCR. 819; TR-I-43), and no transcript or tapes of the preliminary hearing were available. (TR-I-43). Nor did he receive any information on the process used for obtaining petitioner's confession (PCR. 819, 820). Despite the fact that

as a result of that hearing the items of physical evidence were made available to trial counsel (TR-I-45-46), he did not take advantage of that opportunity to examine them. (PCR. 770; TR-I-502).

In advance of trial counsel requested that petitioner be sent to the State Hospital for a psychological evaluation. (PCR. 768). The report of that evaluation done at the Stoney Building indicated that petitioner was diagnosed as being in the borderline mental retardate range. (PCR. 477, 857-862). Trial counsel did not have an independent psychological or psychiatric evaluation performed on petitioner. (PCR. 782, 294, 435). No psychological evidence or testimony concerning petitioner was presented to the jury in either the 1977 trial or the 1980 re-sentencing trial.

Additional psychological testimony beneficial to the petitioner could have been obtained for use in mitigation at both trials. At the post-conviction hearing Diane Follingstad, Ph.D., a clinical psychologist, testified that an evaluation of petitioner which she conducted revealed that he experiences a very high level of tension and anxiety all of the time (PCR. 480); that he is a high strung, jumpy person who will experience a lot of fears and phobias (PCR. 481); that he will overreact to very minor things (PCR. 481); that he has established very dependent relationships, especially with members of his family (PCR. 482). Dr. Follingstad also testified that petitioner's anxiety neurosis would have been in existence in 1977 (PCR. 489). There was a strong likelihood that petitioner used drugs as a means of reducing anxiety, especially social anxiety. (PCR. 539).

Trial counsel knew that petitioner and codefendant were on drugs at the time of the incident and thought that fact should be a mitigating factor (PCR. 777). However, his focus was on the guilt phase in the 1977 trial and he never considered getting an expert in pharmacology to explain the effect of the drugs (PCR.

788-789). At the re-sentencing trial in 1980 counsel included the use of drugs as part of his mitigating argument (TR-II 1521), but again gave no consideration to obtaining an expert in pharmacology (PCR. 788).

At the post-conviction hearing Donald O. Allen, Ph.D., chairman of the Pharmacology Department at the University of South Carolina School of Medicine, testified concerning phenmetrazine hydrochloride and its effects. Phenmetrazine hydrochloride is a compound in the same class and having similar effects on the central nervous system as amphetamines. (PCR. 545). There was evidence that the drug had an affect on petitioner by his failure to eat and lack of sleep. (PCR. 545). The maximum therapeutic dose of phenmetrazine is 75 milligrams taken by oral ingestion per day. On a mathematical basis the petitioner was taking between five and nine times the maximum therapeutic dose. On a functional basis it was actually several times greater than that because he was injecting the drug interavenously. (PCR. 544-545). A high dose or concentration of phenmetrazine, such as was present in petitioner's case, can lead to a number of central nervous system effects: aggressive behavior, impulsive behavior, poor judgment, acute anxiety bordering on a panic state, and loss of impulse control. (PCR. 545-546). High doses of compounds such as phenmetrazine also produce a syndrome known as amphetamine psychosis, a condition nearly indistinguishable from schizophrenia. (PCR. 546). Any or all of these responses could have occurred in the petitioner. (PCR. 546). This information would have been available in 1977. (PCR. 549).

Trial counsel considered the suppression of the confession central to the defense (PCR. 430, 820). However, he did not call Bobby Carmichael as a witness to corroborate petitioner's testimony that the Lexington Sheriff's Department refused his requests to make phone calls prior to this confessing. (PCR. 190,

194, 197). Carmichael had given a statement to the police in which he indicated that the codefendant had told him about the incident. (PCR. 205). The determination not to use Carmichael as a witness was based on defense counsel's joint representation of petitioner and codefendant and not on an independent assessment of the harm or benefit to petitioner. (PCR. 808, 809).

After the 1977 trial petitioner did not see trial counsel until eight months later when he came to have him sign some papers. (PCR. 435). The next time trial counsel saw petitioner was after the decision on the first appeal. This meeting which lasted thirty minutes was in response to a phone call from petitioner who learned of the decision from television. Counsel gave no real explanation of what would happen at the re-sentencing trial. (PCR. 436-437). Petitioner did not see counsel again until the motions hearing on Thursday before the re-sentencing trial in February, 1980. (PCR. 438). The only two meetings between trial counsel and petitioner to discuss the case lasted for approximately five minutes each and occurred right before petitioner took the stand to testify. (PCR. 439-440). Again all of these were joint meetings between petitioner, and codefendant.

Trial counsel presented only two witnesses in mitigation at the 1980 re-sentencing trial, Mrs. Lizzie Gilbert and petitioner's minister. Mrs. Gilbert testified that counsel did not talk with her about her testimony until shortly before she took the stand.

At the post-conviction hearing the testimony or affidavits of four witnesses who would have been available in 1980 and could have testified in mitigation for petitioner were presented. One of these affidavits was from Tolley Cooper of Salley, South Carolina. (PCR. 854). Mr. Cooper is the former police chief from Salley. He was unable to testify at the post-conviction trial due to his health.

However, Mr. Cooper's affidavit attests that he had known petitioner for years, and that as police chief and as an employer, he had never known petitioner to be in any trouble. In fact, Mr. Cooper said he was shocked when he heard that petitioner had been arrested. Mr. Cooper said he was not contacted by trial counsel in 1977 or 1980, but that if he had been contacted he would have testified for petitioner.

Another affidavit that was submitted was from Mack Woodward. (PCR. 853). Mr. Woodward is a correctional officer and served as supervisor at death row between 1977 to 1980. Mr. Woodward noted that petitioner was an inmate on death row during that period and was a model inmate. Mr. Woodward could have testified in 1980 but was not contacted by trial counsel.

Mrs. Flora W. Harris testified. (PCR. 218-228) Mrs. Harris had known petitioner since he was a small child. She taught him in elementary school and had supervised him in the scouts. In fact, Mrs. Harris was a neighbor of petitioner and had attended the same church with him. As a neighbor and a lifelong friend, she said that she never knew petitioner to be in any trouble, and she was shocked when she heard that he had been arrested.

Mrs. Harris testified that she was not contacted by defense counsel but would have been willing to testify at the previous trials. In fact, Mrs. Harris had taken the day off from work to testify at the post-conviction relief hearing.

Also testifying for petitioner was Barry Naylor. (PCR. 245). Also a lifelong friend, Mr. Naylor attended school and church with petitioner. Mr. Naylor, a recent law school graduate and candidate for admission to the bar, said he would have testified at the previous trials but was not contacted by trial counsel. Mr. Naylor testified that petitioner had a good reputation in their community.

Mr. Maxey Adams, a former supervisor of petitioner would also have been available to testify in 1980. (PCR. 237, 239). None of these witnesses were ever contacted by defense counsel. (PCR. 226, 235, 236, 249, 809).

Any discussions between defense counsel and petitioner concerning the possibility of a conflict of interest arising out of the joint representation were limited, and were conducted with codefendant present. Prior to the 1977 trial defense counsel "told them there might be a time when their interest [sic] might be opposed to one another and they indicated they did not think so." (PCR. 792). Between the guilt and sentencing phases another conference was held at the behest of the trial judge. (TR-I-876). At that meeting counsel told them an argument could be made that codefendant was more culpable because the stab wound was the cause of death. (PCR. 827). No other differences in mitigation between petitioner and codefendant were discussed. (PCR. 827, 829-830). Trial counsel did not discuss the degrees of culpability in terms of the importance of petitioner having separate counsel. (PCR. 814). Defense counsel conceded at the post-conviction hearing that the ramifications of representing both the petitioner and codefendant at the mitigation stage were not clear to him at the time and as a result he never made them clear to petitioner. (PCR. 793, 814-815). Counsel never met with petitioner individually to discuss the possibility of a conflict and to allow him to make an independent decision (PCR. 828). Defense counsel testified that at no time did he discuss the question of a conflict interest with petitioner prior to or during the re-sentencing trial in 1980. (PCR. 815, 828, 830-831, 832).

Petitioner did not see trial counsel again following the 1980 re-sentencing trial until the post-conviction relief hearing. (PCR. 446).

## REASONS FOR GRANTING WRIT

### I.

THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN CUYLER V. SULLIVAN AND WITH THE DECISION OF THE SUPREME COURT OF GEORGIA IN FLEMING V. STATE.

While joint representation is not per se violative of the constitutional guarantee of effective assistance of counsel, Holloway v. Arkansas, 435 U.S. 475 (1978), trial counsel's representation of both petitioner and his codefendant at the 1977 trial resulted in an actual conflict of interest. Because of this actual conflict of interest, trial counsel's performance on behalf of petitioner was adversely affected and petitioner was denied his right to effective assistance of counsel. Cuyler v. Sullivan, 446 U.S. 335 (1980). "[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." 446 U.S. at 349-350.

Trial counsel acknowledged that the suppression of petitioner's confession was crucial to his defense (PCR 430, 820). Trial counsel was also aware that Bobby Carmichael could corroborate petitioner's testimony that the police denied his requests to make phone calls (PCR 808). Trial counsel did not present Carmichael as a witness because petitioner's codefendant had previously admitted his involvement in the incident to Carmichael. (PCR 807). This information would have been admissible against the codefendant, but not as to petitioner. At the post-conviction hearing trial counsel acknowledged that his assessment of the risks in Carmichael's testimony and the decision not to call him were based on the fact that trial counsel was representing both petitioner and his codefendant. (PCR 808-809). Similarly, as a result of this joint representation trial counsel was not in a position to cross-examine the co-defendant when he took the stand or to request an instruction

from the court that the codefendant's statement could not be considered as evidence against petitioner. This denied petitioner his right to confront the witnesses against him.

Unlike in United States v. Ramsey, 661 F.2d 1013 (4th Cir. 1981), where the court found that rather than a conflict, an advantage resulted from joint representation, in this case trial counsel was forced to choose between the interests of his two clients in adopting a strategy. Each of these choices was resolved in a fashion which benefitted the codefendant and adversely affected petitioner.

Trial counsel's joint representation of petitioner and his codefendant at the 1980 re-sentencing trial again resulted in an actual conflict of interest that adversely affected his performance on behalf of petitioner. Cuyler, supra. At the 1977 trial, counsel was faced with a choice between the conflicting interests of his two clients and resolved the issue to the detriment of petitioner.

The fact that the codefendant initiated the robbery and struck the fatal blow provide the petitioner with a strong argument in mitigation. As a result of the joint representation, this argument was never made by trial counsel. (PCR 806). In fact, he did not even cross-examine the pathologist to inform the jury that the only wound inflicted by the petitioner was superficial. Counsel did not point out the ten year age difference between the twenty-one year old petitioner and his codefendant and argue that as the younger brother the petitioner had been lead into the incident by the codefendant. The codefendant's prior history of drug abuse was never presented to the jury. Nor was it revealed to the jury that the petitioner's drug usage began after exposure by his older brother, the codefendant. What amounted to a substantial case in mitigation on behalf of

petitioner could not be presented by trial counsel because of the adverse effect it would have had on the codefendant.

Since petitioner's re-sentencing trial in February of 1980 this Court has clarified the duty required of trial courts faced with multiple representation cases in which a particular conflict is known to exist. See, Cuyler v. Sullivan, supra; Wood v. Georgia, 450 U.S. 261 (1981). In light of these decisions it is now incumbent upon the trial court to make an inquiry into the propriety of multiple representation when it knows or reasonably should know of the particular conflict. There can be no doubt that under this standard an inquiry by the re-sentencing trial court was required in petitioner's case by the varying degrees of culpability apparent from the most basic facts of the case.

In arriving at its conclusion, the court below stated that the evidence offered to demonstrate how petitioner's case could have been presented had there not been joint representation was interesting but did not indicate a conflict of interest. This reasoning reflects a total disregard for the principles embodied in Cuyler. In discussing what is required to meet the burden placed upon a defendant who has raised no objection to the joint representation, this Court offered two prior decisions as illustrative. The petitioner in Dukes v. Warden 406 U.S. 250 (1972), failed in his attempt because he did not identify an actual lapse in representation. By contrast, relief was granted in Glasser v. United States, 315 U.S. 60 (1942), because the evidence revealed omissions resulting from counsel's desire to diminish the jury's perception of a codefendant's guilt. This same type of showing was made in petitioner's case. Petitioner presented numerous omissions that were the result of a desire on the part of trial counsel to diminish or, at least, not to

accentuate the guilt or culpability of petitioner's codefendant. At the post-conviction hearing trial counsel acknowledged that omissions were not decisions independently made on petitioner's behalf, but were the result of the joint representation. (PCR 806-809).

The lower court's conclusion that the petitioner did not meet his burden evinces a misunderstanding of or a total disregard for the standard announced by this Court in Cuyler. In either event the lower court's decision is in direct conflict with the prior decision of this Court.

The question of multiple representation in capital cases is one of significant importance because of the potential for problems and the severity of the risks to which defendants are subjected. It is virtually impossible to imagine a capital case in which the interests of multiple defendants would not differ at either the guilt or innocence phase or the sentencing phase of the bifurcated proceeding. In light of this problem Georgia has adopted a per se rule prohibiting multiple representation in capital cases. Fleming v. State, 246 Ga. 90, 270 S.E.2d 185 (1980). Similarly, in a non-capital case the Third Circuit Court of Appeals affirmed the district court's refusal to allow codefendants to be represented by the same law firm. United States v. Flanagan, 679 F.2d 1072, cert. granted, Flanagan v. United States, No. 82-374, ____U.S.____, 32 Crim. L. 4145 (1/10/83). This was despite a finding that the defendants were thoroughly aware of the potential conflicts and that they voluntarily and intelligently chose to waive any conflict.[2]

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[2]Unlike the defendants in Flanagan who were thoroughly informed by both the court and counsel of the various likely conflicts, petitioner was never adequately advised of the actual and potential conflicts from joint representation in his case. In fact trial counsel testified at the post-conviction hearing that the

(footnote continued on next page)

This Court should grant certiorari and consider this case in conjunction with Flanagan v. United States.

II.

THE DECISION BELOW PRESENTS THE QUINTESSENCE OF THE PROBLEMS CREATED BY THE VARIETY OF STANDARDS APPLIED BY THE UNITED STATES COURTS OF APPEALS AND THE HIGHEST STATE COURTS TO CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL. AS SUCH IT INVOLVES AN ISSUE OF SUBSTANTIAL IMPORTANCE AND SHOULD BE CONSIDERED IN CONJUNCTION WITH STRICKLAND V. WASHINGTON, NO. 82-1554 AND UNITED STATES V. CRONIC, NO. 82-660, WHICH ARE CURRENTLY PENDING BEFORE THIS COURT.

The importance of this issue is without question. As noted in the amici brief filed on behalf of forty-two States, including South Carolina, "[t]he problem is pervasive and the issue complex. As a result, the need to establish a consistent standard of review is immediate." Brief of Amici Curiae in Support of Petition for Writ of Certiorari, Strickland v. Washington, at page 5.

The question of what standard is to be applied to claims of ineffective assistance of counsel takes on added importance in the present case where the uncontroverted evidence on the record established inter alia: 1) that trial counsel failed to conduct any independent investigation to secure evidence or witnesses; 2) failed to secure a psychological evaluation of petitioner; 3) failed to investigate the effects of drugs on petitioner at the time of the crime; 4) failed to present or argue evidence of petitioner's lesser participation in the murder, and where the resentencing trial judge characterized trial counsel's performance as "deficient," "poor," and "cavalier."

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(footnote 2 continued from previous page)

ramifications of representing both petitioner and his codefendant were not clear to counsel at the time and, as a result, he never made them clear to petitioner. No knowing and intelligent waiver of the type required by Johnson v. Zerbst, 304 U.S. 458 (1938), was made by petitioner at either of his trials.

Although the lower court cited McMann v. Richardson, 397 U.S. 759 (1970), and Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), in announcing that the proper test was whether counsel had acted "within the range of competence demanded of attorneys in criminal cases," (Appendix A p. 11) there was no indication of how this "range of competence" was to be determined or applied beyond a reference to the requirements of Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968). Similarly, the lower court gave no indication of the test to be applied in determining whether prejudice was established. As a result, it is impossible to know whether the lower court's subsequent findings of no prejudice were based upon the outcome-determinative test, United States v. Decoster, 624 F.2d 196 (D.C. Cir. 1979); the test of whether the trial, but not necessarily the outcome, would have been altered in a way helpful to the defendant, Washington v. Strickland, 673 F.2d 879 (5th Cir. Unit B 1982); See also, United States ex rel. Green v. Rundle, 434 F.2d 1112 (3rd Cir. 1970); United States ex rel. Johnson v. Johnson, 531 F.2d 169 (3rd Cir. 1976); McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974); or the test of whether it worked to the defendant's actual and substantial disadvantage, Washington v. Strickland, 693 F.2d at 1258 (5th Cir. Unit B 1982), citing United States v. Frady, 456 U.S. 152, 170 (1982).

In direct contrast to the bifurated approach required by Washington v. Strickland, 693 F.2d 1243, 1258 (5th Cir. Unit B 1983), the lower court findings indicate that the questions of ineffectiveness and prejudice were considered in mixed fashion. This method of review created a hodgepodge in which some of the alleged shortcomings of counsel were decided on the question of ineffectiveness while others were decided on the issue of prejudice. In light of the trial court's failure to adequately

set forth the standard applied, there is no way to know whether the proper standard was used.

For these reasons certiorari should be granted and this case should be considered with Strickland v. Washington to determine the proper standard to be applied in claims of ineffective assistance of counsel.

## CONCLUSION

For the reasons mentioned above, the petition for writ of certiorari should be granted.

Respectfully submitted,

Vance L. Cowden
William Lewis Burke, Jr.

University of South Carolina
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Counsel for Petitioner

July 19, 1983

# APPENDIX A

STATE OF SOUTH CAROLINA )
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON )

| | |
|---|---|
| Larry Gilbert,<br><br>Applicant,<br><br>-vs-<br><br>James Aiken, Warden, CCI; Capt. Lester Reynolds, Lexington County Detention Center,<br><br>Respondents. | ORDER |

This matter comes before this Court by way of an Application for Post-Conviction Relief filed June 4, 1982. The Respondents made Return on August 18, 1982, requesting that a hearing be held. A hearing was convened on September 20, 1982, at which time the Applicant was present in court and represented by his court-appointed attorneys, Vance L. Cowden, Esquire, W. Lewis Burke, Esquire, and Naomi E. Mims, Esquire. The Respondents were represented by Donald J. Zelenka, Esquire, and Sally M. Rentiers, Esquire, of the Attorney General's Office.

The Applicant's hearing was consolidated with that of his co-defendant, J. D. Gleaton, who had also filed an Application for Post-Conviction Relief. This was done by agreement of all parties because their allegations were similar and for convenience of the witnesses. During the hearing, the following witnesses testified: Steve Boozer,

Elijah Dunbar, Earl Shirey, Detective Richard Byars, Officer Charles Jones, Dr. Irvin Shaw, Officer James Harris, William Anderson, Officer John Dauth, Coroner Harry Harmon, Officer Renew, Officer Davis, Judge Julius Baggett, Richard Briebart, Esquire, Daniel Beck, Esquire, Bobby Carmichael, Flora Harris, Barry Naylor, Charles Gilbert, Mrs. Lizzie Gilbert, J. D. Gleaton, Larry Gilbert, Dr. Diane Follingstad, Donald O. Allen, Gaston Fairey, Esquire, Peter Hyman, Esquire, Donald V. Myers, Esquire, and Robert W. Mance, Esquire. The Court had before it a copy of the records of the Clerk of Court, the South Carolina Department of Corrections, a transcript of record and briefs on the first direct appeal to the South Carolina Supreme Court, the opinion of the Court, the transcript of record and briefs on the second direct appeal, the opinion of the Court, the Petition for Certiorari in the United States Supreme Court, the Order denying the Writ, various exhibits (listed on pages 2-e through 2-g of the post-conviction hearing transcript), the post-conviction hearing transcript, the deposition of Dr. Raymond Paternoster and exhibits.

The records reflect that the Applicant is presently confined in the Central Correctional Institution of the South Carolina Department of Corrections as a Safekeeper pursuant to orders of commitment of the Clerk of Court for Lexington County, South Carolina. The Applicant and his co-defendant, J. D. Gleaton, were indicted at the September, 1977 term of the Court of General Sessions for Lexington

County for armed robbery and murder. They were represented by Robert W. Mance, Esquire. The Circuit Solicitor served timely notice upon the Applicant that the State intended to seek the death penalty. On September 16, 1977, the Applicant was arraigned, at which time he entered a plea of not guilty.

The trial began on October 4, 1977. On October 6, 1977, the jury found the Applicant guilty of murder and armed robbery. The sentencing hearing was delayed until the following day. After a full sentencing hearing, the jury returned a verdict imposing the death penalty. The Honorable Rodney Peeples sentenced the Applicant to the death penalty for murder and twenty-five (25) years for armed robbery.

Following the imposition of the death penalty by the trial judge, the Applicant appealed his conviction and sentence to the South Carolina Supreme Court. The sentence was subject to automatic review by the South Carolina Supreme Court pursuant to § 16-3-25(A), Code of Laws of South Carolina, Cum. Supp. (1978). The Applicant raised the following exceptions on his direct appeal:

(1) That the stop and subsequent arrest of Appellants was illegal because there was no probable cause and evidence obtained as a result thereof should have been excluded.

(2) That the court erred in allowing the admission of the confessions of the Appellants because they were involuntary having resulted from coercion.

(3) That there was insufficient evidence to support the verdict of guilty.

(4) That the Statute under which the Appellants were sentenced to death is unconstitutional because it still leaves the authority with the solicitor in deciding who shall receive the death penalty and who shall not and by doing so deprives the Appellants herein of equal protection of the laws and due process of law.[1]

On October 2, 1979, the South Carolina Supreme Court, in a full written opinion, affirmed the Applicant's convictions, but vacated the Applicant's death sentence and remanded the case for a re-sentencing hearing. State v. Gilbert, et al., Opinion No. 21060, Filed October 2, 1979.[2]

A re-sentencing hearing commenced on February 19, 1980, in Lexington County before the Honorable Julius H. Baggett. On February 26, 1980, the jury recommended the death penalty for the Applicant; the Honorable Julius H. Baggett imposed the death penalty.

The Applicant appealed his sentence to the South Carolina Supreme Court. He raised the following exceptions:

(1) That the court erred in failing to excuse for cause a prospective juror who had indicated that she could not consider the lack of a prior criminal record as a mitigating factor in possibly lessening the sentence.

(2) That the court erred in excusing prospective juror Margaret Burris on the ground that she had violated the court's order not to read about or discuss the case with anyone where the juror stated that she had had general discussion with her priest but that no specific reference was made to this case.

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[1]The co-appellant, J. D. Gleaton, raised the same allegations; the Supreme Court treated the appeals jointly.

[2]The Supreme Court also affirmed the conviction of the co-appellant and remanded his case for a re-sentencing.

(3) That the court erred in allowing the introduction into evidence of certain photographs of the scene of the offense which depicted numerous bloodstains because said photographs were inflammatory and had no relevance.

(4) That state's exhibit 19 was ruled inadmissible by the court on objection of counsel because it had no relevance and the prosecution admitted it into evidence undetected by the Court and counsel.

(5) That the court erred in allowing the confession because they were obtained by duress and were involuntary.

(6) That the Court erred in limiting Appellants' witnesses on mitigation to those persons who knew them personally.

On September 14, 1981, the South Carolina Supreme Court, in a full written opinion, affirmed the death sentence for the Applicant and his co-defendant. State v. Gilbert, et al., _____ S.C. _____, 283 S.E.2d 179 (1981).

On September 24, 1981, the Applicant filed a Petition for Rehearing and Stay of Remittitur, Application for Stay of Execution of Sentence of Death, and Petition for Withdrawal and Substitution of Counsel. By Order dated October 9, 1981, the South Carolina Supreme Court denied the Petitions for Rehearing and Stay of Remittitur and Application for Stay of Execution of Sentence of Death, and granted the Petition for Withdrawal of counsel by Substitution of Counsel.

By Order of the Clerk of Court of the South Carolina Supreme Court dated October 19, 1981, the execution of Larry Gilbert was scheduled for November 6, 1981. This Order of the Clerk was entered pursuant to the Order of the South Carolina Supreme Court to the Clerk to send the remittitur

and proceed with the execution.

The Applicant filed an Application for Stay of Execution in the Supreme Court of the United States dated October 14, 1981. By Order dated October 21, 1981, the Honorable Warren E. Burger granted a stay of execution pending the timely filing and disposition by the Court of a Petition for Writ of Certiorari.

The Applicant then filed a Petition for Writ of Certiorari in the Supreme Court of the United States on December 8, 1981. The Writ was denied on May 17, 1982. On June 1, 1982, the Supreme Court also denied the Applicant's Application for Suspension of the Order denying Certiorari.

On June 4, 1982, the Applicant filed an Application for Stay of Execution of Sentence of Death in the South Carolina Supreme Court. By Order dated June 10, 1982, the Court granted the Petition for a stay until October 11, 1982.

In his Application for Post-Conviction Relief and an Amendment to the Application, dated September 17, 1982, the Applicant makes the following allegations:

(1) That he was denied the effective assistance of counsel at both the guilt and sentencing phases in violation of the Sixth and Fourteenth Amendments; he alleges that his attorney:

(a) failed to investigate and interview witnesses;

(b) failed to examine physical evidence;

(c) failed to obtain a psychiatric evaluation of Applicant;

(d) failed to adequately prepare a change of venue motion before the second trial;

(e) failed to do research on questions of law;

(f) failed to conduct an adequate voir dire inquiry;

(g) failed to develop the attorney-client relationship with the Applicant;

(h) failed to interview or prepare witnesses who would give favorable character testimony for Applicant;

(i) failed to present evidence in mitigation concerning the Applicant's mental state;

(j) had a conflict of interest in representing both the Applicant and his co-defendant because he could not present the possibility of lesser degrees of culpability and could not adequately cross-examine the co-defendant on Applicant's behalf;

(k) failed to identify and argue the issue of the solicitor's improper argument, the issue of the trial judge's erroneous grant of fifth amendment immunity and the issue of submission of larceny as an aggravating circumstance;

(l) failed to adequately research and prepare the appeal;

(m) failed to object to the court's exclusion of defendants, counsel and the judge from the courtroom during the drawing of the jury;

(n) failed to object to the omission of an instruction on the Miranda warnings from the instructions given to the jury for consideration in determining the voluntariness of Applicant's confession;

(o) failed to impeach Gerald Stoudemire by showing that his testimony at the second sentencing trial was inconsistent with the testimony he gave at the first trial;

(p) failed to object to exclusion of Applicant from a portion of the jury voir dire at the second sentencing trial;

(q) failed to object at the first trial to the charge that invocation of the Fifth Amendment raises no presumption of guilt as being an insufficient instruction and to request an instruction that invoking the Fifth Amendment right against self-incrimination is no evidence whatsoever of guilt and should not be considered by the jury;

(r) failed to object to the opening instruction at the first trial defining reasonable doubt as a substantial doubt;

(s) failed to object to the final instruction at the guilt phase of the first trial that defined reasonable doubt as being a "serious or strong or well-founded doubt as to the truth of the charges,"

(t) failed to object to the court's charge and request an instruction that J. D. Gleaton's confession could not be considered as evidence against Applicant;

(u) failed to object at the first trial to the exclusion of jurors on the basis of their opposition to capital punishment and failed to cite § 16-3-20 (E) which would have precluded disqualification of any juror on the sole basis of that juror's inability to impose the death penalty; and

(v) failed to object to the instruction to the jury at the second sentencing trial that "the hand of one is the hand of all."

(2) That the trial court erred in the following particulars:

(a) Both trial courts failed to include an instruction on the Miranda warnings as part of the instructions given to the jury for their consideration in determining the voluntariness of Appellant's confession;

(b) The trial court failed sua sponte to make the requisite inquiry into the potential for conflict surrounding the joint representation, thereby precluding a voluntary and intelligent waiver of conflict-free representation;

(c) The trial judge at the second sentencing trial excluded Applicant from a portion of the jury voir dire;

(d) The trial judge excluded Applicant, trial counsel, and himself from the drawing of the jury at the second sentencing trial;

(e) The trial judge excluded Applicant's testimony concerning the inconsistencies in the testimony of Gerald Stoudemire;

(f) The court failed to charge at the first trial that the defendant's invocation of the Fifth Amendment constituted no evidence against them whatsoever and raised no inference of guilt;

(g) The court's opening instruction at the first trial defining reasonable doubt as a substantial doubt reduced the State's burden of proof;

(h) The court's final instruction at the guilt phase of the first trial defining reasonable doubt as being a "serious or strong or well-founded doubt as to the truth of the charges" reduced the burden of proof on the State;

(i) The trial judge's failure to instruct the jury at the guilt phase that they could not consider the confession of J. D. Gleaton as any evidence against Applicant denied Applicant his right to confront the witnesses against him; and

(j) The trial judge instructed the jury that "the hand of one is the hand of all" and failed to instruct that the differing degrees of participation of a particular defendant may be considered in mitigation.

(3) The appointment of only one attorney to represent Applicant at his second trial did not comply with the procedural safeguards established for the death penalty cases in South Carolina in § 16-3-26(B).

(4) That the Applicant was denied the right to confront witnesses against him at both phases of trial because counsel made no attempt to cross-examine J. D. Gleaton, the co-defendant, on Applicant's behalf.

(5) That the Applicant was denied a fair trial and due process of law when one attorney represented both Applicant and his co-defendant.

(6) That the Applicant was denied his right to trial by jury fairly selected from a representative cross-section of the community by the systematic exclusion of blacks from his jury at both trials.

(7) The exclusion of jurors at Applicant's first trial on the basis of their opposition to capital punishment produced a jury which was less than neutral with respect to Applicant's guilt or innocence.

(8) That the exclusion from the jury at the second trial of people opposed to the death penalty violated Applicant's rights under the Sixth and Fourteenth Amendments to the neutral and representative jury on the question of punishment.

(9) That the South Carolina death penalty procedure is unconstitutional because it has led to the arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments.

(10) That the South Carolina death penalty statute, as applied, is unconstitutional because it lacks adequate procedural safeguards to insure that the death penalty will be applied in a rational, even-handed fashion.

(11) That the South Carolina death penalty statute, as applied, is unconstitutional because it has resulted in a pattern of racially discriminatory imposition of the death penalty.

(12) That the imposition of the death penalty where the only aggravating circumstances are robbery or larceny is unconstitutional because it is excessive and disproportionate to the crime.

This Court has had the opportunity to review the record in its entirety. I had the opportunity to observe the witnesses presented at the hearing and to pass upon their credibility, considering their demeanor on the witness stand, any interest they may have in the case, any bias or prejudice for or against Applicant, their abilities and opportunities to observe and their displays of expertise. I now set forth the relevant findings of fact and conclusions

of law, as required, pursuant to § 17-27-80, Code of Laws of South Carolina (1976).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Applicant's initial allegation concerns the effectiveness of his attorney, Robert W. Mance, Esquire. Applicant alleges twenty-two separate failings of Mr. Mance. It is clear that a defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759 (1970). A court should not measure the competency of counsel's advice by retrospectively considering whether it was right or wrong. The proper test is whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." 397 U.S. at 770-71. In Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), the Court said that a convict generally must establish that his counsel's error was so flagrant that a court can conclude that it resulted from neglect or ignorance rather than from informed professional deliberation. The Court in Marzullo also noted that, in determining whether counsel was effective, they adhered to the statement made in Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968):

> Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters

> of defense can be developed, and to allow himself enough time for reflection and preparation for trial.

The Court in Marzullo also noted that the normal competency standard is necessarily broad and flexible because it is designed to encompass many different factual situations and circumstances.

In reviewing the entire record and hearing all of the testimony presented at the post-conviction hearing, I find that the Applicant was adequately and effectively represented by his attorney at all stages of the proceedings. I specifically find that Applicant's attorney met each requirement imposed under the Coles v. Peyton test.

The following witnesses testified that Mr. Mance failed to contact them prior to trial: Steve Boozer, Elijah Dunbar, Earl Shirey, Detective Byars, Officer Jones, Dr. Irvin Shaw, Officer Harris, William Anderson, Officer Dauth, Coroner Harmon, Officer Renew and Officer Davis; there was also a stipulation that Officer Johnson would have testified that Mr. Mance also failed to contact him. All of these witnesses testified for the State at the first and/or second trial. They were either eyewitnesses who had identified the car, investigating officers or custodians of evidence, including the bullet, autopsy report and coroner's report. Mr. Mance testified that, as soon as he was retained, he met with the Applicant and his co-defendant (about 2 - 3 days after arrest) and obtained statements. He testified that they informed him that the statements were accurate.

He said that he talked with Solicitor Myers and Assistant Solicitor Littlejohn and also briefly with Officer Jones who informed him that he would have to get all of his information from the solicitor. Mr. Mance further testified that he received from the solicitor an incident report, the statements, a list of witnesses and what their reported testimony would be. He said he saw the autopsy report as well as the notes from the inquest. He stated that he never viewed the bullet. Mr. Mance testified that he knew that several people had identified the car, that Mr. Roberts was reported to be an identification witness and that the stab wound, not the bullet wound, was the fatal wound. Based on Mr. Mance's knowledge gained from the solicitor on what the evidence would be and his review of the statements and various reports he was provided, I find no error or failing in his not contacting any of these witnesses for the State.

It is equally apparent that Mr. Mance attempted to find witnesses in Applicant's behalf. He questioned Applicant as well as his family about potential witnesses and the best witnesses he was able to come up with were Applicant's brother, sister, mother and pastor. Mr. Mance testified that he had never heard of Flora Harris or Barry Naylor. Also, these witnesses were not crucial ones; they did not have close contact with Applicant at or near the time of the crime. They merely had known him as a child. I find that Mr. Mance's investigation and interview of witnesses was adequate.

Applicant alleges that Mr. Mance failed to examine physical evidence. He admitted that he did not examine the bullet. However, his failure to do so resulted in no prejudice to Applicant. Applicant has failed to point to other physical evidence that his attorney should have viewed and failed to do so.

The Applicant alleges that his attorney failed to obtain a psychiatric or psychological evaluation of Applicant. Mr. Mance testified that the Applicant was sent to the State Hospital and he reviewed the report, finding nothing to support a possible plea of insanity. Although in hindsight, perhaps such an evaluation would have been useful to the attorney, nothing in Dr. Follingstad's testimony at the hearing convinced me that an evaluation of Applicant would have been important for the judge or jury to know either at the guilt or sentencing stage. Applicant has attempted to show that this type of evaluation would have been necessary, especially in the sentencing phase of the trial as evidence in mitigation; however, this type of evidence can be helpful or harmful to a defendant in that regard and Dr. Follingstad's testimony did not convince me that it would have been helpful. Also, there was nothing to indicate to the attorney that an evaluation was necessary. The failure to have an evaluation done was not ineffective assistance of counsel.

The Applicant next alleges that his attorney failed to adequately prepare a change of venue motion before the

second trial. Mr. Mance testified that his motion for change of venue before the first trial was denied and, although he made a motion for change of venue and continuance at the second trial, he felt it did not have much of a chance. In fact, Applicant himself testified that the publicity was greater before the first trial. I find that Mr. Mance's preparation on the matter of a motion for change of venue, when viewed in light of the surrounding circumstances, did not amount to ineffective assistance of counsel. Also, it is clear from the record that an impartial jury was selected. cf. State v. Truesdale, Opinion No. 21799, filed October 19, 1982.

The allegation that Mr. Mance failed to do research on questions of law has no merit.

The allegation that Mr. Mance failed to conduct an adequate voir dire inquiry also has no merit. His second voir dire inquiry was much more effectively done and, even Mr. Fairey agreed that he did a much better job in the second trial. The South Carolina Supreme Court has reviewed this case twice under the in favorem vitae doctrine and, having reviewed the entire record each time, including the voir dire of the juries, they obviously have found no flaw in either voir dire inquiry. Since the voir dire was part of the record before our Supreme Court, I conclude that it is not properly before me now. In view of that, I cannot find that Mr. Mance did an inadequate job on voir dire.

The next allegation states that Mr. Mance failed to develop the attorney-client relationship. The testimony at the hearing indicates that, although Mr. Mance was retained by Applicant's mother, he met with Applicant, informing him of all developments, alternatives and planning the case with Applicant. While it is true that Mr. Mance represented Applicant's co-defendant, who was his half-brother, it is clear that he met with them separately as well as together and it was their choice to proceed together. I find that the attorney-client relationship did exist between Mr. Mance and the Applicant.

Applicant alleges that Mr. Mance failed to interview or prepare witnesses who would give favorable character testimony for Applicant. The record and testimony shows that he had the brother, sister, mother and pastor testify about Applicant's character and he could find no better witnesses than those he presented.

The next allegation is that Mr. Mance failed to present evidence in mitigation concerning the Applicant's mental state. The Applicsnt himself testified regarding his mental state. He testified that he was on drugs at the time and that they only meant to rob the victim. Also, in hearing the testimony of Dr. Follingstad and Dr. Allen, I find that it was not error for counsel not to call these or similar witnesses in mitigation.

The Applicant alleges that Mr. Mance had a conflict of interest in representing both the Applicant and his

co-defendant because he could not present the possibility of lesser degrees of culpability and could not adequately cross-examine the co-defendant on Applicant's behalf. It is clear that multiple representation alone is not violative of the Sixth Amendment. Holloway v. Arkansas, 435 U.S. 475 (1978). Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. Cuyler v. Sullivan, 446 U.S. 335, 349 (1980). In Cuyler, the Court stated:

> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection to the multiple representation must demonstrate that an actual conflict of interest adversely affected his lawyer's performance...446 U.S. at 338.

In the instant case, there was no actual conflict of interest. Mr. Mance testified that he told Bobby Carmichael and Wilbur Gleaton who were charged as accessories that he could not represent them because their interests were opposed to those of Mr. Gilbert and Mr. Gleaton. He recognized this as a potential for conflict. Mr. Mance further testified that the Applicant and his co-defendant had consistent stories and they said they wanted to be tried together. The record indicates that their stories were consistent, that neither one blamed the other. In United States v. Ramsey, 661 F.2d. 1013 (4th Cir.1981), the co-defendants had a single attorney and later claimed there was a conflict of interest; the court said that there was no conflict in the defenses or the theories and, therefore, no

conflict existed. In fact, the Court said that there was an advantage to having a single attorney because it allowed him to formulate an internally consistent defense strategy. It is clear that the Applicant and his co-defendant's having a single attorney allowed them to present a consistent and unified defense. Since their stories were always consistent, the Applicant was in no way compromised by the joint representation.

Also, it is important to note that Applicant waived any alleged conflict of interest during his first trial. In fact, before the sentencing portion of the first trial, the judge specifically discussed the possibility of varying degrees of culpability and whether Applicant and his co-defendant wanted to proceed with one attorney. Applicant waived any alleged conflict at that time.

Applicant claims there was a conflict in the second trial because there were different degrees of culpability which was not brought out because he and his co-defendant were both represented by Mr. Mance. He argues that Mr. Mance should have argued that he was less culpable because he did not inflict the fatal wound, he was younger than his co-defendant and his drug use had started through his connection with his co-defendant. Essentially, he contends that his attorney should have put the blame on his co-defendant. However, Mr. Mance testified that the Applicant did not want to put the blame on his co-defendant at the time of the trial. Additionally, all of these things

were brought out to the jury at trial with the possible exception of the last one. I do not find the claim that Applicant's co-defendant got him involved with drugs to be credible. I find that no actual conflict of interest existed in this joint representation. During the hearing, there was much testimony concerning how this case could have been tried differently, were the two defendants represented by two lawyers or even by a single lawyer. Although this testimony was interesting, I find that it indicated no actual conflict of interest. I also note that representation by a single attorney allowed the two defendants to put forth a consistent defense.

The Applicant alleges that Mr. Mance failed to identify, research and prepare certain issues for appeal. In reviewing the records and briefs, I find that his preparation for appeal was adequate. It is clear that counsel need not appeal every possible question of law at the risk of being found to be ineffective. Gillihan v. Rodriguez, 551 F.2d. 1182 (10th Cir. 1977). Decisions concerning which legal issues will be urged on appeal are uniquely within the lawyer's skill and competence, and their resolution is ultimately left to his judgment. Ennis v. LeFerne, 560 F.2d. 1072, 1075 (2d Circuit 1977), cert. denied, 435 U.S. 976 (1978). There was no ineffective assistance on appeal.

The remaining allegations relating to effectiveness of counsel are contentions that Mr. Mance failed to object to

certain instructions, lack of instructions and decisions made by the trial court. In reviewing all of these allegations, I find no merit in them. The record demonstrates that Mr. Mance made all the necessary objections. The allegation that Mr. Mance failed to impeach Gerald Stoudemire on inconsistent statements has no merit. That was obviously a tactical decision, especially in light of the fact that Mr. Stoudemire was the son of the victim and had a very hostile attitude.

After thoroughly reviewing all of the allegations relating to ineffective assistance of counsel, I find that Applicant was afforded the effective assistance of counsel and that Mr. Mance represented him within the range of competence demanded of attorneys in criminal matters. Marzullo v. Maryland, supra. I also find that there was no actual conflict of interest in the joint representation of Applicant and his co-defendant. Cuyler v. Sullivan, supra.

The Applicant alleges approximately ten errors on the part of the trial judges. These include alleged errors in instructions to the jury, exclusions of Applicant from jury voir dire and jury selection and exclusion of certain testimony of Applicant. Post Conviction Relief proceedings do not afford relief in cases of alleged errors for which remedies were available before or during the original trial or on direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d. 883 (1975); Irick v. State, 264 S.C. 632, 216 S.E.2d. 545 (1975). I cannot pass on alleged trial court

errors; consequently, these allegations must be dismissed and denied.

Applicant's next allegation (#3) states that the appointment of one attorney to represent him at his second sentencing trial did not comply with the procedural safeguards established for the death penalty in South Carolina in § 16-3-26(B). Although Judge Grimball signed an order appointing Mr. Mance in 1980, this Order was not necessary. Mr. Mance had been retained and paid $8,500.00 in 1977 to represent Applicant and his co-defendant. He had never been relieved by order of the Court and, therefore, remained on the case as attorney of record from July, 1977, through 1980. The allegation that he was an appointed attorney lacks merit.

Applicant alleges that he was denied the right to confront witnesses against him because his attorney did not cross-examine his co-defendant on his behalf. This is patently absurd. The State did not offer the co-defendant as a witness against the Applicant. The co-defendant took the stand to testify for himself and for the Applicant. Their stories were consistent. Clearly, he was not a witness against Applicant at either trial and, therefore, there was no right to cross-examine him on Applicant's behalf.

The Applicant next alleges that he was denied a fair trial and due process of law when one attorney represented both he and his co-defendant. I have already found that no

conflict of interest existed in the joint representation of these two defendants. There was no actual conflict and they were not denied due process of law or a fair trial.

Next, the Applicant claims that he was denied his right to trial by a jury fairly selected from a representative cross-section of the community by the systematic exclusion of blacks from his jury at both trials. He contends that the Solicitor used his peremptory challenges to exclude blacks. The use of peremptory challenges to exclude blacks from juries does not violate an accused's constitutional rights. Swain v. Alabama, 380 U.S. 202 (1965). However, Solicitor Myers testified that his office does not have a policy of using peremptory challenges to exclude blacks. I find his testimony in this regard to be credible. As the South Carolina Supreme Court recently stated on the issue of peremptory strikes:

> We do not presume the existence of discrimination by officers of the State, and we are not impressed by a showing of "patterns" which does not even begin to account for the obvious variables [juror age, education, occupation, address, prior jury service etc.] ... State v. Truesdale, filed October 19, 1982.

His allegation is without merit for relief.

In his seventh allegation, the Applicant contends that the exclusion of jurors at the first trial because of their opposition to capital punishment produced a jury which was less than neutral with respect to the Applicant's guilt. Apparently, he seeks to raise in this post-conviction relief setting the same issue of "conviction proneness" rejected by

the South Carolina Supreme Court in State v. Truesdale, supra. (October 19, 1982, p.7). In light of the Supreme Court's rejections of the Hovey v. Superior Court, 168 Cal. Rptr. 128, 616 P.2d 1301 (1980) decision, the allegation is without merit and must be dismissed.

The Applicant alleges that the exclusion from the jury at the second sentencing trial of people opposed to the death penalty violated his rights under the Sixth and Fourteenth Amendments to a neutral and representative jury on the question of punishment. Although the United States Supreme Court has held in Witherspoon v. Illinois, 391 U.S. 510 (1968) that a sentence of death cannot be carried out if the jury which imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction, Respondents submit that that was not the situation in Applicant's case. In Witherspoon, the Court also said that nothing in their holding would bear upon the power of a state to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial, or (2) that their attitude toward the death penalty would prevent them from making an

impartial decision as to the defendant's guilt. In State v. Linder, _____ S.C. _____, 278 S.E.2d 335 (1981), the South Carolina Supreme Court held that a trial judge may disqualify prospective jurors from service on a jury panel who are absolutely opposed to capital punishment under any circumstances. Respondents submit that all potential jurors excused for cause because of opposition to the death penalty clearly indicated that they would automatically vote against the imposition of the death penalty without regard to any evidence that might be developed at trial. Therefore, the allegation should be dismissed and denied. See: State v. Copeland, Op. No. 21808, filed November 10, 1982, p. 6. Furthermore, this issue is not properly before this Court in a post-conviction relief proceeding. Simmons v. State, supra.

The Applicant's remaining allegations deal with the constitutionality of the South Carolina death penalty act and its application. He contends that it is applied in an arbitrary and capricious manner, lacks adequate procedural safeguards and has resulted in a pattern of racially discriminatory imposition of the death penalty. He additionally claims that the imposition of the death penalty where the only aggravating circumstances are robbery or larceny is unconstitutional because it is excessive and disproportionate to the crime. The Applicant is essentially asking this Court in a post-conviction relief setting to re-open closed questions with respect to the South Carolina

death penalty statute § 16-3-20, et seq., Code of Laws (1976) and to this particular case in which the Court specifically found "the death penalty is proportionate to a crime of this nature and to the crime and defendants in this case." State v. Gilbert, 283 S.E.2d 179, at 182 (1981).

In addition, the South Carolina Supreme Court in discussing the overall topic of proportionality specifically dealt with five (5) cases involving the application of the death penalty in South Carolina and stated as follows:

> It is of no consequence that the South Carolina "universe" has consisted of only five cases to this date. State v. Shaw, supra, presented the first occasion for proportionality review under our current statute. We noted then that no similar cases existed, but the sentence imposed was none the less appropriate and neither "excessive" nor "disproportionate" considering the crime and the defendants. Indeed, a comparable crime involving multiple murder by two or more accomplices, in the course of armed robbery, kidnapping and rape, attended by unspeakable cruelty and mutilation, has yet to come before this Court. Shaw, thus, constitutes a category unto itself.
>
> In like manner, the succeeding three cases of State v. Hyman, supra, State v. Gilbert, supra, and State v. Thompson, supra, proved "similar" in only the most superficial manner--that is, the aggravating circumstance in each instance was armed robbery. The transcripts of these cases are public records, as pointed out in Thompson, supra, and when inspected reveal significant differences between them.
>
> William Gibbs Hyman conspired with four other persons to rob two elderly brothers. The conspirators made their way at nightfall to the victims' home where stealth and deception were initially employed. Failing in their first foray, the conspirators applied violence. One of the victims was able to fire a shot from within before the home was stormed. From the testimony, a jury could have concluded that the decedent was killed by a shot-gun blast fired by Hyman at close range while the victim stood disarmed. It

appears that everyone at the scene was intoxicated, but the defendant was sufficiently sober to continue demanding money while he beat the surviving brother with one of the two weapons involved. Mitigating testimony was offered by a clergyman as well as family members who related personal frustrations and tensions suffered by the defendant at some time before the killing. In addition, the defendant himself took the stand to express his remorse. The jury recommended a sentence of death and we affirmed, considering the penalty neither excessive nor disproportionate with respect to the crime and the defendant and notwithstanding the lack of any truly "similar" case to that point in time.

Larry Gilbert and J. D. Gleaton, brothers of whom Gleaton is the elder, robbed and murdered the operator of a filling station shortly after noon following a morning spent cruising in their automobile in search of (and possibly using) drugs. In the course of the robbery, the victim was savagely stabbed seven times as he struggled with Gleaton and was shot once by Gilbert. From the testimony, a jury could have inferred that the shot was fired while the victim lay on the floor of his business establishment. A witness testified that one of the assailants laughed at the victim in his agony, which testimony was sharply contested by defendants. Mitigating testimony was taken from a clergyman and the defendants' mother. Gilbert and Gleaton in turn took the stand to state that they had acted on impulse and had intended no harm to the victim. The jury recommended death sentences, and we affirmed. The cases of State v. Shaw, supra, and State v. Hyman, supra, offered no assistance by way of comparison, particularly since the latter case had involved an elaborate, multiparty scheme to rob and the use of weapons by the robbery victims. In the crime of Gilbert and Gleaton, the deceased was unarmed and could only use his hands to ward off the repeated thrusts of the knife. We held the sentence of death to be neither excessive nor disproportionate considering the crime and the defendants.

Albert "Bo" Thompson shot and killed the proprietor of a small store in the course of a robbery. In fact the defendant shot his victim twice, the second time in the face from close range. Testimony of an accomplice indicated that the defendant, on the morning of the incident, had determined to rob someone somewhere and that one other store was reconnoitered before that of the victim was chosen. No mitigating testimony was offered, unlike the cases of Hyman, Gilbert and Gleaton.

The jury was asked only to consider the defendant's age as well as a brief unsworn statement by him in the course of which he wept and asserted that the killing was an accident. Thompson's crime differed from those of Hyman, Gilbert and Gleaton in other respects, too. The latter defendants all offered some evidence of acting under the influence of alcohol or drugs, while Thompson inferably acted with a clear mind and cool deliberation. Thompson fired the fatal shots, it appears, after his accomplice left the store, whereas Hyman, Gilbert and Gleaton killed their struggling victims in the presence of others or one another. The jury could reasonably have concluded that Thompson acted alone in committing a senseless murder without even a pretext of justification. The jury recommended a sentence of death and, notwithstanding the lack of a truly "similar" case for guidance, this Court found the sentence neither excessive nor disproportionate with respect to the crime and the defendant. In the course of proportionality review, this Court examines the record through the eyes of the sentencing authority. In the case of Thompson, however, this Court could not avoid noting that we had previously affirmed his conviction for an armed robbery occurring subsequent to this murder, one in which the defendant had again held a gun to the head of the robbery victim. State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1981). At trial the State had no opportunity to offer this conviction in evidence, yet it clearly would have rebutted mitigating arguments under § 16-3-20(C)(b)(1) of the Code. We do not consider it amiss to recognize such information regarding an appellant in the course of our final proportionality review.

The remaining case of State v. Horace Butler, supra, involved the abduction, rape and murder of an eighteen-year-old girl as she left her place of employment after dark. The defendant offered his poor record in school, his youth, and the fact that he had a small child as mitigating evidence. We affirmed the conclusion of the jury that a sentence of death was neither excessive nor disproportionate in light of the defendant's character and his wanton crime. No truly "similar" case existed for comparison, and by the same token State v. Butler, supra, offers no guidance in the review of the instant appeal.

Unlike previous cases involving murder and armed robbery, this appeal arises from two separate atrocities occurring in a single night. Unlike Hyman, Gilbert, Gleaton and Thompson, appellants Copeland and

Roberts were not content to terrorize and slay their victims where they found them but instead transported them to backroads execution sites. Two of the victims were brought down by gunfire as they sought to escape. Thus wounded, they were subsequently riddled with bullets as they lay on the ground. On the body of one, a series of post-mortem stab wounds was also inflicted.

Mitigating evidence for appellant Copeland was limited to the testimony of his former wife who vouched for the promptness of his alimony and child support payments. She also stated that she had never seen him do anything cruel. More extensive mitigating testimony was offered on behalf of appellant Roberts. Family members as well as a trained psychologist revealed that Roberts had suffered an unhappy childhood, problems in school, the recent traumatic slaying of a brother, drug abuse and injuries in fights and car accidents. Roberts was characterized as having an impulsive personality and being easily led by others. By way of the trial court's charge to the jury, Roberts received the full benefit of the relevant statutory mitigating circumstances. In the end it is probable that the jury relied on the psychologist's own statement that Roberts' prognosis for "straightening up" was poor.

It is our conclusion that no "similar" case exists that would permit meaningful comparative review of these death sentences. In view of the facts set forth above, however, we are satisfied that the sentence of death imposed on each of these appellants was appropriate and neither excessive nor disproportionate in light of their crimes and their respective characters. The sentences are accordingly affirmed.

It should now be clear that proportionality review in South Carolina is first and foremost directed to the particular circumstances of a crime and the specific character of the defendant. Comparative review will be thereafter undertaken if possible. Without hazarding a prediction, we can imagine that the "universe" of similar cases will gradually expand in the fullness of time. At present, South Carolina has found the death penalty to be neither excessive nor disproportionate in six distinct cases: (1) where one or more defendants rob, abduct, rape and murder one or more victims in circumstances which starkly reveal the malignant character of the defendant or defendants; (2) where a victim, armed and defending himself, is slain by an intruding defendant who is himself armed (and possibly intoxicated) while engaged in robbing

> the deceased; (3) where two or more defendants, on impulse or even while intoxicated rob and murder an unarmed struggling victim in his place of business; (4) where a single defendant, alone with an unarmed and unresisting victim, robs and without mitigation whatever murders the deceased; (5) where a single defendant kidnaps, rapes and murders a victim; (6) where one or more defendants perpetrate multiple offenses by robbing, kidnapping and murdering one or more victims in each separate incident. As comparable cases arise, they will be reviewed against this background. As dissimilar circumstances may lead to affirmed sentences of death, new "classes" or types of capital cases will be added to the existing "pool." State v. Copeland, Opinion No. 21808, Filed November 10, 1982, pp. 13-15.

The issues raised in allegations nine and ten contend that the death penalty statute is unconstitutional because it lacks adequate procedural safeguards. The constitutionality of the statute has been resolved by the Supreme Court. State v. Copeland (S.C. 1982), supra; State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981), State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980). His present allegations are without merit. Furthermore, these issues are direct appeal issues and not properly before this Court in a post-conviction relief setting. Simmons v. State, supra.

In allegation twelve, the Applicant asserts that the imposition of the death penalty is excessive and disproportionate when the only aggravating circumstances are robbery or larceny. This Court needs to look no further than the findings of the Supreme Court in State v. Gilbert cited above as denying this allegation. As has been previously stated post-conviction relief is not a substitute for an appeal and the Applicant may not reassert issues already resolved adversely to the Applicant by the direct appeal

in the post-conviction forum. Simmons, supra. The allegation must be dismissed.

The sole remaining allegation concerns allegations that the death penalty as applied, has resulted in a pattern of racially discriminatory imposition. Specifically, he alleges that the actual application of South Carolina's death penalty statute has been so arbitrary and so influenced by the play of such impermissible factors as the race of the offender and victim as to violate the Eighth Amendment. Further, he alleges that the application of these statutes violates the Equal Protection Clause because they have an adverse impact on black offenders, and on those convicted of the murders of white victims.

In support of these allegations, the Applicant offered a survey and analysis of all alleged homicide cases reported to S.L.E.D. from June 8, 1977, until December 31, 1981. The results of this analysis are contained in a series of statistical tables offered with the post-hearing deposition of Assistant Professor Raymond Paternoster of the College of Criminal Justice, University of South Carolina. Dr. Paternoster has attempted to show that racial factors, particularly the race of the homicide victim in each case, has a significant role in the determination of which murder defendants are subjected to prosecution under the death penalty act and in the decision as to which defendants shall be sentenced to death.

The South Carolina Supreme Court recently addressed a similar challenge in State v. Hyman, 281 S.E.2d 209, at 213 (1981). In Hyman, the Court made the following statement:

> (10) Appellant asserts the South Carolina Death Penalty Statute, § 16-3-20 is unconstitutional because is is disproportionately imposed on individuals who kill white persons. The constitutionality of our death penalty statute was upheld in State Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979). "[P]urposeful discrimination may not be assumed or merely asserted ... It must be proven ..., and the burden is on the one asserting discrimination. Swain v. State of Alabama, 380 U.S. 202, 205, 209, 85 S.Ct. 824, 827, 829, 13 L.Ed.2d 759 (1965); ..." Maxwell v. Stephens, 348 F.2d 325 (8th Cir. 1965). Appellant has made no showing of disproportionality. Williams, et al. v. Borden's, Inc., 274 S.C. 275, 262 S.E.2d 881 (1980); Apodaca v. Oregon, 406 U.S. 404, 413, 92 S.Ct. 1628, 1634, 32 L.Ed.2d 184 (1972); Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979); State v. Moultrie, 273 S.C. 532, 257 S.E.2d 730 (1979). Hyman, 281 S.E.2d at 213.

The Applicant is now apparently trying to make the "proportionality" showing in this forum.

This Court is constrained to reject the findings of Dr. Paternoster. A court of law must at the threshold establish to a legal certainty the integrity of the data upon which the survey was based. cf. State v. Truesdale, supra. In this survey, Dr. Paternoster relied on a computer printout which contained glaring inaccuracies. Of paramount importance, the data, as revealed by Dr. Paternoster on cross-examination, inaccurately reported the homicide for which Gilbert and Gleaton received the death penalty which indicated a single victim and single offender rather than

the accurate single victim-multiple offender. (Deposition Tr. p. 72). Dr. Paternoster also used data that did not accurately reveal the presence of accomplices in the Albert "Bo" Thompson case which had the same inaccuracy in that Mr. Thompson had at least one accomplice. See, State v. Copeland. The data and survey did not take into account numerous factors including the criminal characteristics of the offender and prior record, the presence of aggravating or mitigating circumstances, differences in the circumstances of the crimes, and the presence or lack of evidence. In his academic survey, Dr. Paternoster had failed to show to this Court the threshold reliability necessary to accomplish his goal of showing improper application of our statutes.

This Court agrees with the Supreme Court's analysis that any comparative study based upon arrests (in this case mere "incidents") would entail this Court to engage in "intolerable speculation." Copeland. In Copeland, the Supreme Court set out a proper model for proportionality review in this State. The well-reasoned opinion reflects the defects in the approach taken by the Applicant in this case, as forecasted by the Respondent's cross-examination.

Assuming that the data was reliable, the reasoning of the United States Court of Appeals for the Fifth Circuit is well-founded. In Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), the Court held that where a state has in operation a sentencing review system which is constitutional

on its face, a federal habeas corpus court should not look behind the individual defendant's sentence and weigh evidence calculated to show that the system is being discriminatorily applied, unless the circumstances of the petitioner's case are such that the petitioner is "so clearly undeserving of capital punishment that to impose it would be patently unjust and would shock the conscience," Spinkellink, at 606 n. 28, or where "petitioner can show some specific act evidencing intentional or purposeful racial discrimination." Spinkellink, at 614 n. 40. accord; McCorquodale v. Balkom, 525 F.Supp. 431 (N.D.Ga. 1981); Pierre v. Morris, 607 P.2d 812 (Utah 1980); Fitzpatrick v. State of Montana, 638 P.2d 1002, 1010 (Montana 1981). In this case, as reflected in our Supreme Court's findings, the penalty is proportionate to the crimes and there has been no evidentiary showing of any act evidencing intentional or purposeful discrimination on the basis of race.

Finally, the statistical evidence presented falls short of establishing an equal protection violation. Smith v. Balkcom, 671 F.2d 858 (5th Cir. 1982). In this case, as in Smith, the Applicant's statistician sought to determine the total number of homicides in South Carolina through use of Supplemental Homicide Reports (SHR's) submitted by law enforcement agencies. The study then compares these reported incidents with death penalties ultimately requested and imposed, after trial, in the state. No data is offered as to whether or not charges or indictments grew out of

reported incidents or as to whether charges were for murder with statutory aggravating circumstances, murder in which no aggravating circumstances were alleged, voluntary manslaughter, involuntary manslaughter or other offenses. The data is not refined to select incidents in which mitigating circumstances were advanced or found on those cases in which evidence of aggravating circumstances was sufficient to warrant submission of the death penalty to a finder of fact. No incidents resulting in a not guilty verdict were removed from the data. The unsupported assumption is that all such variables were equally distributed racially, sexually, offender and victim, throughout the incident reports and SHR's. While such a survey is of academic interest, no conclusions of evidentiary value can be predicated upon such unsupported assumptions. The raw data selected for the statistical study bear no more than a highly attenuated relationship to capital cases in South Carolina actually presented for trial. The leap from that data to the conclusion of discriminatory intent or purpose leaves untouched countless racially neutral variables brought out on cross-examination. In this case, the proffered evidence is not of sufficient probative value to have required any further response or evidence from the Respondents or require any further evidentiary hearing. Smith v. Balkcom, supra. The allegations are denied and dismissed.

Based on the foregoing reasons, this Court finds that the Applicant was afforded all of his constitutional rights. This Court finds that the Applicant has not met his burden of showing that his Application has any meritorious ground for post conviction relief under the Uniform Post Conviction Procedure Act, Section 17-27-70, et seq., Code of Laws of South Caroina (1976).

IT IS THEREFORE ORDERED:

(1) That the Applicant be remanded to the custody of the Respondents pending resolution of the Stay of Execution; and

(2) That the Application for Post-Conviction Relief, as amended, be dismissed and denied with prejudice.

AND IT IS SO ORDERED this 23 day of November, 1982.

RALPH KING ANDERSON, JR.
Presiding Judge

Florence, South Carolina.

# APPENDIX B

# The Supreme Court of South Carolina

FRANCES H. SMITH
CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211

April 6, 1983

Vance L. Cowden, Esquire
Clinical Law Office
U.S.C. School of Law
Columbia, South Carolina 29208

Re: Larry Gilbert v. James Aiken, Warden, C.C.I., et al.

Dear Mr. Cowden:

The Court has this day denied your Petition for Certiorari in the following order:

"Petition denied.

s/ J. Woodrow Lewis, C.J.
For the Court

April 6, 1983."

If you would like to have the extra copy of the record in this case, please advise this office within ten days.

Very truly yours,

Deputy Clerk

RDM/wh

cc: Ms. Sally M. Rentiers

Rec'd 4/7/83
VLC

# APPENDIX C

# The Supreme Court of South Carolina

FRANCES H. SMITH
CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211

April 20, 1983

Vance L. Cowden, Esquire
Clinical Law Office
U.S.C. School of Law
Columbia, South Carolina 29208

W. Lewis Burke, Esquire
Clinical Law Office
U.S.C. School of Law
Columbia, South Carolina 29208

Re: Larry Gilbert v. James Aiken, Warden, et al.

Gentlemen:

Your Petition for Rehearing and Stay of Remittitur of Denial of Writ of Certiorari in the above matter has today been denied in the following order:

"Petition denied.

s/ J. Woodrow Lewis C.J.
For the Court

April 20, 1983."

Your application for Stay of Execution of Sentence of Death has today been denied in the following order:

"Petition denied.

s/ J. Woodrow Lewis C.J.
For the Court

April 20, 1983."

Very truly yours,

Frances H. Smith
CLERK

FHS/wh
cc: Ms. Sally M. Rentiers

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 83 5088

LARRY GILBERT,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, Larry Gilbert, respectfully moves this Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46 of this Court. The affidavit of petitioner in support of this motion is attached hereto.

Presented herewith is a petition for writ of certiorari of the moving party.

Respectfully Submitted,

Vance L. Cowden
William Lewis Burke, Jr.
School of Law
University of South Carolina
Columbia, South Carolina 29208

Counsel for Petitioner

July 18th, 1983

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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NO. _____

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LARRY GILBERT,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

---

AFFIDAVIT OF LARRY GILBERT
IN SUPPORT OF MOTION TO PROCEED IN
FORMA PAUPERIS

---

I, Larry Gilbert being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? "No."

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. "Last day of employment was July 13, 1977, and I earned approximately $480 a month."

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? "Yes."

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. "Prior to my imprisonment I purchased a home through a Farmers Home Administration mortgage for my sister, Carolyn Gleaton of Route 1, Box 38-F, Salley, South Carolina. She made all of the payments on the house. After my imprisonment, the Farmers Home Administration agreed to transfer the title and mortgage to my sister. I received seventy ($70.00) dollars from Farmers Home Administration in this transfer in the early part of 1981."

3. Do you own any cash or checking or savings account? "Yes."

a. If the answer is yes, state the total value of the items owned. "I have approximately eighty-five ($85.00) dollars in my prison account.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? "No."

5. List the persons who are dependent upon you for support and state your relationship to those persons. "None."

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Larry Gilbert

Larry Gilbert

SWORN TO and subscribed before me

this 18th day of July, 1983.

Laura Beal (RESEAL)

Notary Public for South Carolina

My Commission Expires: 12-3-91

ORIGINAL

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Office - Supreme Court, U.S.
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AUG 22 1983
ALEXANDER L. STEVAS,
CLERK

SL 22 PAGE 79

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 83-5088

LARRY GILBERT,

PETITIONER,

VS

STATE OF SOUTH CAROLINA,

RESPONDENT.

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211

COUNSEL for Respondent

19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

---

NO. _____

---

LARRY GILBERT,

PETITIONER,

vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

---

RESPONDENT'S BRIEF IN OPPOSITION

---

The Respondent, State of South Carolina, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Supreme Court of South Carolina's denial of review of the Order of the Court of Common Pleas for Lexington County, South Carolina, in this case. Those Orders are attached to the Petition as Appendix A and B.

## JURISDICTION

The judgment of the Court of Common Pleas was issued on November 23, 1982. The Petitioner filed a timely Notice of Appeal to the South Carolina Supreme Court. A Petition for a Writ of Certiorari pursuant to Rule 9 of the Rules Governing Post-Conviction Procedure was timely filed. The Petition was denied on April 6, 1983. He filed a timely Petition for Rehearing which was denied on April 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## STATEMENT OF THE CASE

This matter comes before this Court from Applications for Post-Conviction Relief filed by Larry Gilbert (hereafter Gilbert) and J. D. Gleaton (hereafter Gleaton) challenging their October, 1977, armed robbery and murder convictions and February, 1980, death penalty sentences. Each Application was denied after an evidentiary hearing by written Order dated November 23, 1982 (Petitioner's Appendix A). The appeal to the South Carolina Supreme Court was dismissed by a denial of a Petition for a Writ of Certiorari on April 6, 1983, and April 20, 1983.

Gilbert and Gleaton were indicted in the September, 1977, term of the Court of General Sessions for Lexington County for the July 12, 1977, armed robbery-murder of Ralph Stoudemire. They were brought to trial on October 4, 1977, and convicted of both offenses on October 6, 1977. On October 7, 1977, they each received the death penalty. Upon appeal to the South Carolina Supreme Court, their convictions were upheld and sentences vacated and remanded for resentencing. State v. Gilbert and Gleaton, 273 S.C. 690, 258 S.E.2d 890 (1978).

The resentencing hearing before a newly selected jury began on February 19, 1980, and resulted in each defendant again receiving the death penalty on February 26, 1980. Upon appeal, the death sentences were upheld by the Supreme Court. State v. Gilbert and Gleaton, 277 S.C. 53, 283 S.E.2d 179 (1981). In the trial, initial appeal, resentencing, and final appeal, the defendants were both represented by the same attorney, Robert W. Mance.

The criminal incident leading to this conviction and sentence can be summarized as follows: At approximately 1:00 P.M., on Tuesday, July 12, 1977, Gilbert and Gleaton stopped at Ralph Stoudemire's SOC Station in South Congaree after driving around the area searching for a place for a robbery. Gleaton entered the station, asked for cigarettes, and informed the shopowner that it was a robbery. Gilbert

remained outside until a struggle between Gleaton and Mr. Stoudemire began. During the struggle, Mr. Stoudemire received five stab wounds to his body, one being the fatal wound. Gilbert, who entered the store while the struggle was occurring, fired at the victim with a .22 calibre pistol wounding Mr. Stoudemire. The struggle continued outside his shop where the defendants and his dying father were viewed by the son across the street. The two men then left the scene. During the state post-conviction hearing, each defendant acknowledged his involvement in this murder.

Robert Mance became involved in the cases of Gilbert and Gleaton on July 15, 1977, when members of their family contacted him. He accompanied the family on July 15, 1977, for his first meeting with each defendant. During this meeting, he obtained and discussed copies of each of their inculpatory statements. They advised him that the statements were accurate. (PCR p. 767). After this meeting, Mance met with them on numerous occasions, as well as meeting with family members. Counsel discussed potential witnesses with the defendants and asked Charlie Gilbert to locate some in Salley, South Carolina. (PCR p. 764). Counsel reviewed the Solicitor's witness list with the Solicitor's office and learned the nature of their testimony. He also reviewed copies of the autopsy report, the incident report, and the statements of Gilbert, Gleaton, Bobby Carmichael, and Wilbert Gleaton. (PCR p. 816). Counsel reviewed the scene of the incident and photographs in preparation for the trial. In addition, he had both defendants sent to the State Hospital for a mental evaluation.

During his investigation and interviews, he was advised that the defendants were allegedly smoking marijuana and taking some pills. The day before the initial trial, he had each defendant write down what happened from the time of the arrest to the confession. In addition, he talked with each defendant alone about calling him as a witness.

In the 1977 trial, after the guilt phase conviction and prior to the sentencing phase, the trial judge made an inquiry about the existence of a conflict of interest and the satisfaction of each defendant with counsel's representation. In particular, the judge made inquiry of the Petitioner, his co-defendant, and counsel concerning the potential for a conflict of interest. (TR-I, Addendum, pp. 881-885). Prior to that inquiry, counsel Mance advised the trial court that he had fully discussed "matters of argument concerning degrees of culpability." (TR-I, Addendum, pp. 876-883). At the state post-conviction hearing, counsel affirmed that culpability was discussed with both defendants. (PCR p. 826, ll. 9-19).

Counsel represented the Petitioner on appeal to the South Carolina Supreme Court. After the sentence was vacated, counsel represented the defendants in the resentencing proceeding in 1980.

## REASONS WHY THE WRIT SHOULD BE DENIED?

### I.

### THE DECISION BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUE CONCERNING WHETHER AN ACTUAL CONFLICT OF INTEREST EXISTED WHICH ADVERSELY AFFECTED THE REPRESENTATION IN ACCORD WITH THE DECISIONS OF THIS COURT IN CUYLER V. SULLIVAN AND WOOD V. GEORGIA.

In Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.E.2d 333 (1980), the Supreme Court stated, regarding multiple representation, "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Id. at 348, 100 S.Ct. at 1718. Thus, a mere showing of multiple representation is not enough; to obtain a new trial, a defendant must show an "actual conflict of interest." The Cuyler opinion went on to stress, however, that a defendant "who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice ... ." Id. at 349, 100 S.Ct. 1718. But as the lower court asserted, the conflict must be real, not some attenuated hypothesis having little consequence to the adequacy of representation. Accord. U.S. v. Martorano, 620 F.2d 912 (1st Cir. 1980).

In order to establish an actual conflict of interest, the petitioner must prove two elements. First, he must demonstrate that some plausible alternative defense strategy or tactic might have been pursued. Foxworth v. Wainwright, 516 F.2d 1072, 1079 (5th Cir. 1975). He need not show that his defense would necessarily have been successful if it had been used, but merely that it possessed sufficient substance to be a viable alternative. Id. Second, he must establish that the alternative defense was inherently in conflict with the attorney's other loyalties or interests. Brien v. U.S., 695 F.2d 10 (1st Cir. 1982). The Petitioner has not made this showing.

Gilbert argues that the potential conflict prevented his attorney from calling Bobby Carmichael to testify that the police allegedly denied Carmichael's request to make telephone calls upon his arrest which would corroborate Gilbert's similar testimony in the suppression hearing. The record reflects that counsel Mance discussed the possibility of having him testify for Gilbert but "the State wanted to use [him]." (PCR p. 195). There was no testimony presented that Carmichael viewed or heard the Petitioner being denied the opportunity to make a telephone call. Therefore, upon careful examination, the tactics Gilbert suggests that his attorney could have pursued appear to be merely hypothetical choices that in reality could not have benefitted Gilbert and were often not in any conflict with counsel Mance's other loyalties. Counsel testified at the state hearing that it was his assessment of Carmichael's testimony that it was a risk that he did not want to take and it would not be in their best interest to call him. (PCR pp. 775, 808-809). Carmichael's statement to the police on July 14, 1977, implicated both co-defendant Gleaton (PCR p. 205, ll. 15-17) on a statement he made to Carmichael and implicated Gilbert in which Gilbert told him the "car was involved in an armed robbery and murder charge." (PCR p. 206, ll. 13-15). Here evidence was equally damaging against both Petitioners in the guilt phase area and trial counsel's fears were accurate and informed. Furthermore, during the post-conviction hearing, each defendant fully admitted his involvement in the murder armed robbery.

The Petitioner contends that counsel's representation of both parties caused counsel to fail to present mitigation in the way he now desires to have done it. The trial record was uncontradicted that Gleaton was in the store and Gilbert "only" shot the victim who died as a result of stab wounds. The record showed that Gilbert was ten years younger than his thirty-one year old codefendant.

Counsel did not fail to present or pursue any defense or mitigation strategy because of the representation of each defendant. He did what lawyers are necessarily limited to do; present the facts of the case to the jury in their best light. Here, the defendants would not place the blame on each other. The lower court factually rejected the claim that Gleaton got Gilbert involved with drugs. Even if that factor existed, it did not cause a "conflict of interest." The defenses and strategies were entirely consistent in this case. U.S. v. Ramsey, 661 F.2d 1013 (4th Cir. 1981). There is no constitutional requirement that a mere potential conflict of interest requires vacation of a sentence or conviction.

The Petitioner requests this Court to consider it with U.S. v. Flanagan, 679 F.2d 1072, cert. granted, Flanagan v. U.S., No. 82-374, __U.S.__, 32 Crim.L. 4145 (1/10/83). Flanagan concerns a Federal District Court disqualification of counsel based upon a potential conflict of interest pursuant to Fed.R.Crim.P. 44(c). The issues in Flanagan are not similar with this case and involve whether the district court abused its supervisory discretion regarding the issue of conflict of interest. It concerns whether criminal defendants have an absolute right to the lawyer of their choice. These issues are not presented in this case.

Accordingly, it is submitted that this Court should deny certiorari.

II.

THE DECISION IN THE LOWER COURT CORRECTLY DECIDED THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL APPLYING THE STANDARD APPLIED BY THIS COURT IN McMANN V. RICHARDSON.

The issue concerning the standard applicable to claims of ineffective assistance of counsel is presently before this Court in Strickland v. Washington, No. 82-1554. Respondent submits that the facts of this case, as found by the lower court, support the legal conclusion that the Petitioner was not denied the effective assistance of counsel within the standard of competence demanded of attorneys practicing criminal law. McMann v. Richardson, 397 U.S. 759 (1970).

Contrary to the Petitioner's position presented in his Petition, counsel conducted an investigation and attempted to find witnesses in his client's behalf, sent his client to the State Hospital for a mental evaluation, discussed the condition of the Petitioner at the time of the crime concerning the ingestion of alcohol or drugs, learned and presented to the jury the degree of participation in the murder. The state post-conviction court found that the Petitioner was adequately and effectively represented at all stages. It found that any witnesses proposed to be presented were not crucial and did not have close contact with the petitioner at or near the time of the crime.

There is no conflict in the circuits or states that the determination of whether defense counsel was ineffective must be based on the totality of the circumstances. Ward v. U.S., 694 F.2d 654 (11th Cir. 1983). It is equally clear that counsel's advice need not be errorless, and need not involve every conceivable defense, no matter how peripheral to the normal focus of counsel's inquiry, but it must be within the realm of competence demanded of attorneys representing criminal defendants. Tollett v. Henderson, 411 U.S. 258 (1973); McMann v. Richardson, supra. The record before the lower court

reflected an assiduous, competent, and reasonably effective defenses and mitigation strategy.

A petitioner who seeks resentencing through allegations of a discrete failure by his trial attorney's investigation of, and preparation for, his sentencing hearing may not rest on proof only of the failures alleged and its constitutional dimension. He also shoulders the burden of proving that his counsel's ineffectiveness resulted in an actual and substantial disadvantage to the course of his defense. Baldwin v. Maggio, 704 F.2d 1325 (5th Cir. 1983). Here the petitioner was unable to meet such a showing.

For all the foregoing reasons, the Petition for Certiorari must be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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NO. _____

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LARRY GILBERT,

PETITIONER,

vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

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CERTIFICATE OF SERVICE

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I, Donald J. Zelenka, Assistant Attorney General, do hereby certify that I have served Respondent's Brief in Opposition to Petition for Writ of Certiorari on Petitioner by depositing a copy of the same in the United States mail, postage prepaid, and addressed as follows:

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This 19th day of August, 1983.

DONALD J. ZELENKA